



**Financial Services
Commission**

Information page

Alternative Investment Fund Managers Directive Private Equity Provisions

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Any advice or interpretation covered in this information page represents the views of the FSC as to its expectations of how the requirements of the AIFMD are to be complied with and/or how it fails to be applied. This however is not intended as a definitive interpretation of the AIFMD which is ultimately a matter for the courts to determine. The FSC does not provide, or purport to offer, legal advice.

1. Introduction

- 1.1 In this information page, reference is made to the Alternative Investment Fund Managers Directive 2011/61/EU ("AIFMD"). There are no technical level 2 standards on the private equity provisions.
- 1.2 Articles 26 to 30 of the AIFMD detail the obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers. This set of Articles is more commonly known as the "Private Equity Provisions".
- 1.3 The purpose of this information page is to provide clarity on the obligations imposed on AIFMs which invest in non-listed companies and issuers.

2. Scope

Article 26 of AIFMD

- 2.1 This information page, which relates to Articles 26 to 30 of the AIFMD, applies to the following:
 - (a) AIFMs managing one or more AIFs which either individually or jointly (on the basis of an agreement aimed at acquiring control), acquire control of a non-listed company in accordance with section 2.5 below;
 - (b) AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquire control of a non-listed company in accordance with section 2.5 below.
- 2.2 The provisions in this information page will not apply where the non-listed companies concerned are:
 - (a) small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; or
 - (b) special purpose vehicles with the purpose of purchasing, holding or administering real estate.
- 2.3 Without prejudice to sections 2.1 and 2.2 above, section 3.1 below shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.
- 2.4 Sections 4.1, 4.2, 4.3 and section 6 will apply also to AIFMs managing AIFs that acquire control over issuers; and for that purpose, sections 2.1 and 2.2 above shall apply with any necessary modifications.
- 2.5 For the purpose of sections 2 to 6, for non-listed companies, control shall mean more than 50% of the voting rights of the companies; and
 - (a) when calculating the percentage of voting rights held by the relevant AIF, in addition to the voting rights held directly by the relevant AIF, the voting rights of the following shall be taken into account, subject to control as referred to above being established:
 - (i) an undertaking controlled by the AIF; and
 - (ii) a natural or legal person acting in its own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF;

- (b) the percentage of voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended; and
 - (c) notwithstanding point (i) of Article 4(1) of the AIFMD¹, for the purpose of sections 4.1, 4.2 and 4.3 and section 6 in regard to issuers control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC (on takeover bids)².
- 2.6 Sections 2 to 6 will apply:
- (a) subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC (on the general framework for informing and consulting employees)³; and
 - (b) without prejudice to any stricter rules adopted by Gibraltar or other Member States with respect to the acquisition of holdings in issuers and non-listed companies in their territories.

3. Notification of the acquisition of major holdings and control of non-listed companies

Article 27 of AIFMD

- 3.1 When an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such an AIF must notify the FSC of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.
- 3.2 When an AIF acquires, individually or jointly, control over a non-listed company pursuant to section 2.1 above, the AIFM managing such an AIF must notify the following of the acquisition of control by the AIF:
- (a) the non-listed company;
 - (b) the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
 - (c) the FSC.
- 3.3 The notification required under section 3.2 above must contain the following additional information:
- (a) the resulting situation in terms of voting rights;
 - (b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
 - (c) the date on which control was acquired.

¹ AIFMD Article 4(1)(i) defines “control” as that meaning given to it in Article 1 of Directive 83/349/EEC (on consolidated accounts).

² Directive 2004/25/EC Article 5(3) states: “The percentage of voting rights which confers control [...] and the method of calculation shall be determined by the rules of the Member State in which the company has its registered office.”

³ Directive 2002/14/EC Article 6 contains rules on the communication of confidential information.

- 3.4 In its notification to the non-listed company, the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in section 3.3 above; and the AIFM must use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this section.

4. Disclosure in case of acquisition of control

(Article 28 of AIFMD)

- 4.1 When an AIF acquires, individually or jointly, control of a non-listed company or an issuer pursuant to section 2.1 above, the AIFM managing such AIF shall make the information referred to in section 4.3 below available to:
- (a) the company concerned;
 - (b) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
 - (c) the FSC.
- 4.2 The FSC may require the information referred to in section 4.3 below to be made available to competent authorities of the non-listed company.
- 4.3 The AIFM must make available:
- (a) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
 - (b) the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and
 - (c) the policy for external and internal communication relating to the company in particular as regards employees.
- 4.4 In its notification to the company under subsection 4.1(a) above, the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in section 4.3; and the AIFM must use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this section.
- 4.5 When an AIF acquires, individually or jointly, control of a non-listed company pursuant to section 2.1 above, the AIFM managing such AIF must ensure that the AIF, or the AIFM acting on behalf of the AIF, disclose its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to:
- (a) the non-listed company; and
 - (b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-

listed company or through a register to which the AIFM has or can obtain access;

and the AIFM managing the relevant AIF shall request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in this subsection to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

- 4.6 When an AIF acquires control of a non-listed company pursuant to section 2.1 above, the AIFM managing such an AIF must provide the FSC and the AIF's investors with information on the financing of the acquisition.

5. Specific provisions regarding the annual report of AIFs exercising control of non-listed companies

Article 29 of AIFMD

- 5.1 When an AIF acquires, individually or jointly, control of a non-listed company pursuant to section 2.1 above, the AIFM managing such an AIF shall either:
- (a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with section 5.2 below is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
 - (b) for each such AIF include in the annual report provided for in Article 22 of the AIFMD (on annual reports), the information referred to in section 5.2 below relating to the relevant non-listed company.
- 5.2 The additional information to be included in the annual report of the company or the AIF must include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report; and the report shall also give an indication of:
- (a) any important events that have occurred since the end of the financial year;
 - (b) the company's likely future development; and
 - (c) the information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC (on safeguards for companies).
- 5.3 The AIFM managing the relevant AIF shall either:
- (a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in section 5.1 above relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in Article 22(1) of the AIFMD (on annual reports); or
 - (b) make available the information referred to in subsection 5.1(a) to the investors of the AIF, in so far as already available, within the period referred to in Article 22(1) of the AIFMD (on annual reports) and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the law of Gibraltar.

6. Asset stripping

Article 30 of AIFMD

- 6.1 When an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to section 2.1 above, the AIFM managing such an AIF, for a period of 24 months following the acquisition of control of the company by the AIF:
- (a) may not facilitate, support or instruct any distribution, capital reduction, share redemption or acquisition of own shares by the company as described in section 6.2 below;
 - (b) in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, may not vote in favour of a distribution, capital reduction, share redemption or acquisition of own shares by the company as described in section 6.2 below; and
 - (c) must in any event use its best efforts to prevent distributions, capital reductions, share redemptions and the acquisition of own shares by the company as described in section 6.2 below.
- 6.2 The obligations imposed on AIFMs pursuant to section 6.1 above, shall relate to the following:
- (a) any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
 - (b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;
 - (c) to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in point (a).
- 6.3 For the purposes of section 6.2 above:
- (a) the term 'distribution' includes, in particular, the payment of dividends and of interest relating to shares;
 - (b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10% of the reduced subscribed capital; and
 - (c) the restriction referred to in subsection 6.2(c) above is subject to Article 20(1)(b) to (h) of Directive 77/91/EEC (on safeguards for companies).



7. Application of implementing measures

Any measures adopted by the European Union Commission under Articles 26 to 30 of the AIFMD (the private equity provisions) shall be applicable.